

July 17, 2020

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**VIA U.S. MAIL**

U.S. Environmental Protection Agency  
Region 2 Office, Permitting Section  
290 Broadway, 25th Floor  
New York, New York 10007  
Attention: Ms. Suilin Chan

**Re: Limetree Bay Refining, LLC and Limetree Bay Terminals, LLC PAL Permit Application, EPA-R02-OAR-2019-0551**

Dear Ms. Chan,

As you know, Limetree Bay Refining, LLC and Limetree Bay Terminals, LLC (“Limetree”) are waiting on the issuance of the above-referenced Plantwide Applicability Limit (PAL) Permit for the refinery and terminal. In the meantime, Limetree submits this letter to respond to the November 24, 2019 comment letter jointly submitted by the St. Croix Environmental Association, the Center for Biological Diversity, the Sierra Club, and Elizabeth Leigh Neville. The commenters argue that issuance of the PAL Permit is a federal action that requires EPA to consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (jointly, the “Services”) “to ensure that the polluting activities contemplated by the Draft Permit [] comply with the Endangered Species Act.”<sup>1</sup> The commenters are incorrect.

*First*, the commenters claim that the restart of the refinery, not the air emissions authorized by the Draft PAL Permit, will affect federal listed species, triggering consultation with the Services. The PAL Permit, however, does not authorize the restart of the refinery. As you know, the purpose of the PAL Permit is to establish voluntary pollutant-specific plantwide emission limitations that will allow Limetree to make post-restart changes to its operations while limiting emissions increases to levels that do not trigger the Prevention of Significant Deterioration of Air Quality permit requirements. Consultation is only required if the activity the *PAL Permit* authorizes may affect federal listed species. The commenters do not contend that the activities authorized by the PAL Permit will adversely affect listed species or critical habitat. Instead, they assert:

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<sup>1</sup> Letter from St. Croix Environmental Association, the Center for Biological Diversity, the Sierra Club, and Elizabeth Leigh Neville (Nov. 24, 2019) at 2.

1. “EPA must consult with [the Services] to ensure that the *Refinery restart* will not jeopardize the continued existence of the above-listed species.”<sup>2</sup>
2. “This project presents serious risks to wildlife vis-à-vis the air emissions contemplated by the Draft Permit, as well as other impacts of the project including, but not limited to, as oil spills, other accidents, and ship strikes. Accordingly, it is apparent that *the Refinery restart* will almost certainly result in the take of Endangered or Threatened species.”<sup>3</sup>
3. “The listed species in the impact zone of the facility are additionally at risk from increased vessel traffic that will necessarily accompany the *Refinery restart*.”<sup>4</sup>

The purported impacts the commenters argue trigger consultation are attributable—if at all—to emissions associated with restarting the refinery, not the PAL. Those effects are thus the “environmental baseline” from which EPA must measure consequences to listed species or designated critical habitat caused by the issuance of the PAL Permit.<sup>5</sup> Because operating under the PAL Permit will not alter the environmental baseline, EPA’s issuance of the PAL Permit will have “no effect” on listed species or critical habitat.<sup>6</sup> Consultation is thus not required because there is no basis for concluding that operating under the PAL Permit “may affect listed species or critical habitat,”<sup>7</sup> and the commenters do not make this claim.

Accordingly, EPA should conclude that issuance of the PAL Permit will have “no effect” on listed species, their habitats, or proposed or designated critical habitat.<sup>8</sup> To the extent that EPA

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<sup>2</sup> *Id.* at 19 (emphasis added).

<sup>3</sup> *Id.* (emphasis added).

<sup>4</sup> *Id.* at 24 (emphasis added).

<sup>5</sup> The “environmental baseline” refers to the condition of the listed species without the effects of the proposed action. 50 C.F.R. § 402.02.

<sup>6</sup> *Id.* § 402.14(a) (requiring consultation only when an agency determines that a proposed federal action “may affect” a listed species or critical habitat); *see also In re Indeck-Elwood, LLC*, 2006 WL 3073109, \*44 n.134, PSD Appeal 03-04 (E.A.B. Sept. 27, 2006).

<sup>7</sup> Consultation is required only for federal actions that “may affect listed species or critical habitat.” 50 C.F.R. § 402.14(a). *See also In re Indeck-Elwood, LLC*, 2006 WL 3073109 at \*48 (agreeing with EPA’s Office of General Counsel that consultation is not required where EPA reaches a “no effect” determination).

<sup>8</sup> 50 C.F.R. § 402.14(b).

has requested written concurrence from the Services, they should concur in EPA's "no effect" determination.

**Second**, even if the impacts commenters allege were attributable to issuance of the PAL Permit, formal consultation is still not required. There is no evidence to support the conclusion that the air emissions authorized by the PAL Permit are likely to adversely affect specific listed species or designated critical habitat. When that is the case, no further action is required.<sup>9</sup>

As a general matter, EPA has pollution control expertise—not the Services. The jeopardy determination the commenters urge here would make the Services responsible for regulating air emissions including greenhouse gas emission effects on climate through the jeopardy consultation program. The ESA, however, was designed to require individualized protections for vulnerable species on a case-by-case basis, when vulnerable species would be directly impacted by a federal action. The ESA does not provide the Services authority to regulate air emissions through a jeopardy biological opinion.

More importantly, not only are the purported impacts the commenters cite unrelated to the PAL Permit, they are too remote and indirect to trigger Section 7 consultation. The commenters assert that "it is apparent that the Refinery restart will almost certainly result in the take" of listed species, but they do not connect the emission of a specific proposed PAL to harm to a specific listed species. They cannot. As the Director of the FWS wrote to Regional Directors in 2008, "[t]he best scientific data available today do not allow us to draw a causal connection between GHG emissions from a given facility and effects posed to listed species or their habitats, nor are there sufficient data to establish that such impacts are reasonably certain to occur."<sup>10</sup> In fact, it is difficult if not impossible to determine the impact of a single contribution to what is a global issue. Thus, when the commenters argue that certain avian species are "particularly vulnerable to the impacts of air pollution," they cannot establish that specific impacts are reasonably certain to occur from the emission of a specific pollutant from the Limetree facility. Nor do they provide any information suggesting that the PALs are inadequate to avoid adverse effects to the listed species or what limits might otherwise suffice. The impacts commenters cite on avian species are indirect and cannot be quantified.

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<sup>9</sup> *Id.* § 402.13(c) ("If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.").

<sup>10</sup> Memorandum from Director of the U.S. Fish and Wildlife Service to Regional Directors, Regions 1-8, *Expectations for Consultations on Actions that Would Emit Greenhouse Gases* (May 14, 2008), available at <https://www.fws.gov/policy/m0331.pdf>.

The commenters' assertions that air pollution presents threats to marine species fail for the same reason. Impacts from ocean acidification, unspecified pollution that settles into water bodies from the air, global warming and ocean acidification from greenhouse gases, and potential impacts of Volatile Organic Compounds on marine mammals are too highly attenuated to require consultation.<sup>11</sup> The commenters have not established a causal connection between the emissions the PAL Permit would authorize and effects on a specific species in a specific habitat. Likewise, their assertion that the PAL Permit will cause serious harm to Sandy Point National Wildlife Refuge, which is located approximately 10 miles from the Limetree facility, is without evidentiary support. The commenters cite no facility-specific impacts on specific protected species to warrant a determination that emissions authorized by the PAL Permit are likely to adversely affect listed species or critical habitat.

Other impacts the commenters note—such as the potential impacts of oil spills and similar accidents—are not related to the PAL Permit at all. The PAL Permit will not increase vessel traffic, lead to ship strikes, or cause oil spills. Those potential impacts are instead related to general refinery operations. With respect to those, Limetree has developed an Integrated Contingency Plan, which outlines Limetree's measures for preventing and responding to potential spills during regular and emergency situations, such as hurricanes. Commenters do not address the specifics of that Plan, nor identify why it is inadequate to mitigate risks. Other measures in place, such as NMFS's vessel strike guidance, minimize the ship strikes the commenters assert will place listed species at risk. Commenters ignore those mitigation measures, as well. Thus, apart from the lack of a causal relation between the PAL Permit and the purported impacts they identify, the commenters are incorrect that the refinery restart will jeopardize listed species or critical habitat.

Because issuance of the PAL Permit will not affect listed species or critical habitat, no consultation is required. Accordingly, EPA should issue a "no effect" determination terminating the process. At a minimum, EPA and the Services should conclude that issuance of the PAL Permit is "not likely to adversely affect" listed species or critical habitat such that formal Section 7 consultation is not required.

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<sup>11</sup> Cf. *Ground Zero Center for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082 (9th Cir. 2004) (where the likelihood of jeopardy to a species is extremely remote, consultation is not required); see also EPA, Light Duty Vehicle Greenhouse Gas Standards and Corporate Average Fuel Economy Standards, Response to Comment Document for Joint Rulemaking at 4-102 (Docket EPA-OAR-HQ-2009-4782); Memorandum from David Longly Bernhardt, Solicitor, U.S. Department of the Interior, *Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the Emission of Greenhouse Gases* (Oct. 3, 2008).

U.S. Environmental Protection Agency  
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Very truly yours,

A handwritten signature in black ink, appearing to read 'LeAnn Koch', with a stylized, cursive script.

LeAnn Johnson Koch

cc: Mr. Joseph Siegel, US EPA, Region 2 (via electronic mail)  
Mr. David Molloy (via electronic mail)  
Mr. Ryan Biggs (via electronic mail)  
Ms. Catherine Elizee (via electronic mail)